facilities cannot demonstrate with any approach to precision the comparative superiority of its proposed service until it has had an actual opportunity to furnish such service. The Court below has itself recognized in another case that the development of the movement of property by air is not to be thwarted by inability to demonstrate in advance, with mathematical precision how much of a specified type of property would move by air facilities "not yet developed and at unknown rates". *American Airlines* v. *Civil Aeronautics Board*, 192 F 2d 417 at 422 (1951).

Without the additional licenses Mackay would be handicapped in seeking telegraph business from Portugal and The Netherlands, because the traffic from each is controlled by entities (Portuguese Marconi and The Netherlands Administration of Posts, Telephone & Telegraph) having no stake in cable business and interested in developing radiotelegraph business (R 580-1, 596-6, 606). Irrespective of Mackay itself, the public is entitled to the benefit of the improved service which Mackay would be in a position to render with the direct circuits here in question. The removal of Mackay's handicap would leave RCAC still in a very strong position. During the period from 1936 (the year of the *Oslo* decision) to 1946, despite Mackay's expansion from 17 to 39 direct circuits and an increase in annual word volume from 7,000,000 words to 74,000,000 words, RCAC's word volume increased from 53,000,000 words to 232,000,000 words during the same period. RCAC's earning and dividend position similarly demonstrates that it has continually improved its position to a high net operating revenue (prior to the hearing) of $6,500,000 in 1945 (R 412-8).

The rapid progress since 1936 of both these competitors, is probably due to the fact, found by the Commission, that there has in that time been a strong trend in international telegraph traffic from cable to radio. Whereas the cable carriers had 70 per cent of the United States international telegraph traffic in 1936, they had less than 50 per cent in 1946 while the radio carriers increased to 53.4 per cent in that year (R 620). This development is due in part to the national and proprietary interest of many foreign telegraph administrations, who derive greater revenue from radio traffic than from cable traffic (R 606, 620). The tendency is one, probably destined to continue, which makes it all the more important that Mackay, as the only radiotelegraph company in a position to compete with RCAC on a world-wide basis, be admitted into important areas in which RCAC now monopolizes the United States business.

The Commission so concluded as regards Portugal and The Netherlands. In support of its determination to open up those points to direct radiotelegraphic competition, it cited the national policy favoring competition (R 623) and the fact that the volume of traffic exchanged by the United States with The Netherlands and Portugal had greatly increased since 1936 (R 619). It recognized that competition provides "a powerful incentive for the rendition of better service at lower cost. Those seeking the patronage of customers are spurred on to install the latest developments in the art in order to improve their services or products, and in order to enable them to reduce expenses and thereby lower their rates or prices. The benefits to be derived from competition should, therefore, not be lightly discarded" (R 623).

The Commission said (R. 623):

> "The national policy of the United States is one favoring competition. This policy is reflected in the anti-trust laws and is based on the principle that competition is generally more desirable than monopoly. Competition can generally be expected to provide a powerful incentive *for the rendition of better service at lower cost.*"

The Commission's decision not only applied the vital national policy favoring competition as against monopoly, as reflected in the antitrust laws and in the Communications Act itself, but is thoroughly consistent with the national defense aspects involved in the promulgation of the Communications Act, as defined in Section 1 thereof (47 USC § 151), and also with the important interest of national security.

Mackay was organized, in the words of the report of the President's Communications Policy Board (*Telecommunications—A Program for Progress*—Report to the President, March 1951), "to challenge RCAC's monopoly in the world-wide radiotelegraph service" (p. 122). That report also pointed out the defense aspects of the matter (p. 129):

> "Officials with a primary responsibility for national security are eager that as many international circuits as possible are kept in operation."

The Commission's action was in our submission well adapted to implement this national security policy in relation to two important traffic centers. In its opinion the Commission pointed out that in the first half of 1947 Portugal ranked thirteenth for outbound traffic and fourteenth for inbound traffic, and that The Netherlands ranked eighth among 89 countries in the area of Europe, Africa and the

Near East for which traffic data are separately reported (R 629).

With respect to both The Netherlands and Portugal, RCAC had a monopoly of direct radiotelegraph service (R 596, 604). Mackay in 1947 handled virtually no traffic with The Netherlands and by virtue of its indirect circuit through Lima, less than five per cent of the traffic with Portugal (R 612). Hence the decision by the Commission brought about for the first time competition through direct facilities between two American radiotelegraph carriers for traffic between the United States and these important centers. The reversal of the Commission's decision by the Court of Appeals sets at naught the public policy and the security interest involved in the opening of dual international circuits.

B. The Commission acted properly in treating competition as a determinative element in applying the statutory standard of serving the "public interest".

The Commission's determination that the granting of petitioner's applications would serve the "public interest" was based primarily on its findings that there should and could be efficient competition in the direct radiotelegraph circuits to The Netherlands and Portugal. In so doing the Commission was applying our national policy weighing competition as against monopoly in the international telegraph field, and therefore cannot be charged with committing an error of law.

The statutory standard of "public interest, convenience, or necessity" was established initially by Congress for the international radiotelegraph field in Section 9 of the Radio Act of 1927 (44 Stat. 1166), which created the Federal

Radio Commission as the licensing authority in the radio field. That Commission, in its Report to Congress for the fiscal year ended June 30, 1928, expressed its construction of the statutory standard as follows (p. 30):

> "That competitive service be established where there are competing applications, or an application or applications to compete with already established service, and that in the grant of competing licenses fairness of competition be established, except that as to an isolated country, which, *in the judgment of the Commission*, will not afford sufficient business for competing wireless lines, only one grant of license shall be made, preferably the first application in priority." (italics ours)

In its Report to Congress for the period ended November 1, 1929, the Federal Radio Commission reiterated its position at page 42. In accordance with that policy, the Federal Radio Commission authorized many competing direct international radiotelegraph circuits (R 450-4).

In 1934, Congress created the Federal Communications Commission and vested in it both the radio licensing authority which had been exercised by the Federal Radio Commission, and the common carrier regulation in the telegraph field, which had been theretofore a function of the Interstate Commerce Commission. (Communications Act of 1934; 47 USC, Sec. 151 *et seq.*; 48 Stat. 1064). The new Commission renewed the then outstanding licenses which authorized direct competitive radiotelegraph circuits (R 452-4, 476-86).

Furthermore, the Communications Act of 1934 expressly extended the national policy in favor of competition, as set forth in the antitrust laws, to the field of international

communications. Section 313 of the Act (47 USC § 313) specifically provides that the antitrust laws "are hereby declared to be applicable . . . to interstate or foreign radio communications". Section 602(d) of the Act (15 USC § 21) delegates to the Commission the enforcement of certain provisions of the antitrust laws.

In an early decision in 1936 (2 FCC 592) the Commission denied Mackay authority to communicate directly with Oslo, Norway, in competition with RCAC, and again in March 1940 (8 FCC 11) in connection with a direct circuit to Rome, Italy.[5] Since 1936 the Commission has granted authorizations for operation of new direct competitive radiotelegraph circuits in the case of 41 countries. Some of these were never established. At the time of hearings herein there were authorized two or more competitive direct radiotelegraph circuits between the United States and 31 overseas points (R 30-8, 455-486). In addition, the Commission each year has granted renewals upon the same statutory basis of the then outstanding licenses authorizing operation of competitive radiotelegraph circuits (R 621-2).

Commission decisions in the past have also taken judicial cognizance of this policy of competition. For example, in the so-called "British Circuits" case in 1947 the Commission stated (R 624-5):

> "As the Commission recently had occasion to observe in its report of July 30, 1947, in Docket No. 8230, dealing with international telegraph rates:
>
> 'The national policy in international communications is that competition be maintained, and Congress has not approved any proposals look-

[5] Several months later cable facilities to Rome were interrupted through military action, and the Commission reversed itself and granted a direct circuit to Mackay, which has been in operation ever since (R 459, Item 19; 482, Item 44).

> ing toward merger of the United States international telegraph carriers.'
>
> Upon consideration of the above factors, it is the Commission's view that the decision on the applications at issue should be calculated to maintain as much competition between Mackay and RCAC as is feasible under the particular circumstances of this case . . ."

. The record shows that since the statutory standard was first applied in the international radiotelegraph field in 1927, the regulatory authority in the large majority of cases has determined that a grant of competitive radiotelegraph facilities would serve the public interest (R 450-486). In reaching the same conclusion in the present proceeding the Commission stated (R 628-9):

> "We are of the opinion that in those instances where there is only one direct radiotelegraph circuit to a point, we should authorize a second competing radiotelegraph circuit where the applicant demonstrates that such competition is reasonably feasible. . . . There remains now for consideration the question of whether the volume of traffic available to the points is sufficient to justify the grant of additional direct radiotelegraph circuits therewith."

The Court will observe the striking similarity between the foregoing statement of the Commission and the policy of the Federal Radio Commission as expressed to Congress in 1928 and 1929. (See page 19 above.)

This Court has held that telephone and telegraph common carrier communication is regulated under the Communications Act of 1934 by analogy with the Interstate

Commerce Commission regulation of rail and other carriers. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 US 470, 474 (1940). In transportation cases this Court has frequently upheld decisions and orders of the Interstate Commerce Commission in authorizing competitive service by a new carrier where it can be done without undue prejudice to the existing carrier. See *e.g. Chesapeake & Ohio Railway Co.* v. *United States*, 283 US 35, 42-3 (1931); *Interstate Commerce Commission* v. *Parker*, 326 US 60, 70-2 (1945); *Norfolk Southern Bus Corp.* v. *United States*, 96 F. Supp. 756, 760-1, affd. 340 US 802 (1950); *United States* v. *Pierce Auto Freight Lines*, 327 US 515, 532 (1946).

We are aware that in these cases and in others it appeared that the proposal under consideration by the regulatory body might improve the then existing situation in some way, over and above the advantages to be gained as the result of competition between the carriers involved. But as far as we have been able to ascertain, this Court has never held that in every case where a regulatory commission is called upon to determine whether the statutory standard of "public interest" has been met, there *must* be a finding to the effect that existing services or facilities are inadequate or inferior, or that our federal policy favoring competition cannot outweigh other considerations in the commission's reaching such a determination.

Thus in *Chesapeake & Ohio Railway Co.* v. *United States*, 283 US 35 (1931) the appellant Chesapeake & Ohio sought to reverse the decision of the Interstate Commerce Commission on the ground that it was actually based "upon a naked finding that competition between carriers and competitive service to shippers will result" and insisted that

under the Transportation Act the Commission "may not authorize new construction for the purpose of continuing such competition" (283 US at 38 and 41). In dismissing these contentions and in affirming the decision of the Commission, this Court said (pp. 42-3):

> "There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction. Under the Act it was the duty of the Commission to find the facts and, in the exercise of a reasonable judgment, to determine that question. *Texas & Pac. Ry. Co. v. Gulf, C.&S.F.Ry.*, 270 U.S. 266, 273.
>
> "Undoubtedly the purpose of these provisions is to enable the Commission, in the interest of the public, to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service. In the absence of a plain declaration to that effect, it would be unreasonable to hold that Congress did not intend to empower the Commission to authorize construction of new lines to provide for shippers such competing service as it should find to be convenient or necessary in the public interest. Indeed § 5 (4) of the Act, authorizing the Commission to adopt a plan for the consolidation of railway properties into a limited number of systems, clearly discloses a policy on the part of Congress to preserve competition among carriers. . . . And the Commission has recognized the advantages of competitive service to shippers especially in respect of a diversified car supply for the shipment of coal and lumber; it suggests the possibility of failure of operation from various causes, that under some circumstances competition operates to stimulate better service and that reasonable competition may be in the public interest."

In the *Norfolk Southern Bus* case this Court affirmed (340 US 802) the decision of the statutory court which had refused to set aside and annul an order of the Commission granting a competing bus service between two points. Dobie, C. J. in writing the opinion for the lower court said (96 F Supp at 760-1):

> "There was no necessity for the Commission to make any specific finding concerning the inadequacy of the existing service.
>
> "Competition among public carriers may be in the public interest and the carrier first in business has no immunity against future competition. . . . Even though the resulting competition causes a decrease of revenue from one of the carriers, the public convenience and necessity may be served by the issuance of a certificate to a new competitor."

Respondent undoubtedly will contend in this Court, as it did below, that its own existing facilities to The Netherlands and Portugal are more than adequate to handle the volume of traffic available. Since respondent established its circuit with The Netherlands it has created additional traffic capacity far in excess of requirements for the entire industry. It installed four-channel multiplex equipment in addition to a Morse circuit (R 114, 129-32, 371-82, 516-7, 570-1), and yet in the peak year 1947 used only *one* of the four channels of its multiplex equipment (R 128, 130-1, 386-7, 570).

If a carrier, by creating facilities not needed for the traffic available, can thereby exclude the advent of competition, such practice is certainly not sound, and the principle is not one to be encouraged by a regulatory agency con-

trolling a competitive field. In fact, the courts have held that the creation of excess capacity, for the purpose or effect of thwarting competition, is a violation of the antitrust laws. In *United States* v. *Aluminum Company of America*, 148 F. 2d 416, 431 (2nd Cir. 1945), the Court said:

> "It [the defendant] insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel."

These words were quoted with express approval by this Court in *American Tobacco Co.* v. *United States*, 328 US 781, 814 (1946) as a description of an illegal monopoly. The words "to face every newcomer with new capacity, already geared", seem to fit exactly the present situation, where respondent has created far greater capacity than the available traffic justified and is now using the argument of excess capacity to oppose the entrance of Mackay's competition.

This Court in *McLean Trucking Co.* v. *United States*, 321 US 67 (1944) emphasized that a regulatory commission was under a duty to consider the national policy in favor of competition as expressed in the antitrust laws in the performance of its statutory duties. There the Court extensively pointed out the special role of the administrative agency in weighing the various elements and factors which go to make up the statutory standard. In upholding an approval by the Interstate Commerce Commission of a merger of motor carriers this Court made it very clear

that the national policy favoring competition must be considered in applying the statutory standard (p. 87):

> "The preservation of independent and competing motor carriers unquestionably has bearing on the achievement of those ends [referring to the national transportation policy]. Hence, the fact that the carriers participating in a properly authorized consolidation may obtain immunity from prosecution under the antitrust laws *in no sense relieves the Commission of its duty*, as an administrative matter, *to consider the effect* of the merger *on competitors, and on the general competitive situation* in the industry in the light of the objectives of the national transportation policy.
>
> In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy." (italics ours)

It then went on to point out that the "complex" task of resolving opposing considerations of this nature had been left by Congress to the "wisdom and experience" of the administrative agency.

In our submission the majority below misconstrued the *McLean* decision. They relied (R 700-1) on the fact that this Court there stated (321 US at 83-4) that "the policies of the antitrust laws determine 'the public interest' in railroad regulation only in a qualified way"; and that "there may be occasions when 'competition between carriers may result in harm to the public as well as benefit;' . . ."

But these statements of the law are entirely consistent with what the Commission has done in the instant case. The Commission has here balanced the long-range advantages resulting from direct radiotelegraph circuit competition against possible claimed present disadvantages of short-term duration, and expressly acknowledges that an application is not in all cases to be granted merely because the effect would be to produce additional competition (R 627). In other words, what the Commission here has done exactly conforms with the governing considerations stated by this Court in the *McLean* case, having regard to the fact that this Court imposed upon regulatory agencies the "duty" as an administrative matter to consider "the general competitive situation in the industry".

No administrative agency could better have fulfilled this mandate than the Federal Communications Commission has done in the instant case. The dissenting Judge was right about the *McLean* case; and in fulfilling the responsibility imposed upon it by law, the Commission should not have been reversed by the majority below.

C. The so-called *Oslo* case was not controlling upon the Federal Communications Commission in determining petitioner's present applications.

The majority of the Court of Appeals, in reversing the decision and order of the Commission, evaded the national policy respecting competition, avoided the directive of this Court in *McLean Trucking Co.* v. *United States*, 321 US 67 (1944), and in reality predicated its decision on its own previous determination rendered some 14 years ago in the *Oslo* case,[6] wherein the court affirmed an order of the Com-

[6] *Mackay Radio & Telegraph Company* v. *Federal Communications Commission*, 97 F 2d 641 (1938).

mission which refused to allow Mackay direct circuits to Oslo, Norway (R 699-701).

The *Oslo* case did not come to this Court. The majority below seemed to find some significance in the fact that in consequence the effect of the *Oslo* case was not limited by this Court (R 700). But surely the affirmance there by the District of Columbia Court of Appeals of an administrative decision based on a record made in 1935 could not as matter of law establish any controlling principles for this case. Here the Commission has granted the additional licenses requested, whereas there the license had been refused.

Although superficially the question before the Commission in the *Oslo* case was similar to the question before the Commission here, in the sense that the question in both cases was whether duplicate circuits should be authorized, the different action of the Commission in the two cases is a determining circumstance. In other words, the Court of Appeals' affirmance of the Commission's adverse action is not a guide for its reversal of the Commission's positive action. Here, we respectfully submit, the majority below was confused on a primary point.

Also material, of course, is the fact that the two records are entirely different. The new matter which the Commission had in the instant case is reflected in its findings. Those findings dealt with the increase in volume of international telegraph traffic since 1936 (R 619); the strong trend from cable to radio (R 620), consequent authorizations by the Commission of duplicating direct circuits since 1936 (R 621); the effect of the operation of direct circuits on ability to develop traffic (R 626), the improvement in Mackay's service from the granting of the applications (R 576, 596, 605-6), and the increased importance of The Netherlands and Portugal as traffic centers (R 629).

The decision of the Commission in the *Oslo* matter did not establish any statutory criteria or constitute a statement of its policy for the future. The question in the *Oslo* case was a limited one. The Commission recognized that fact in its decision in the instant proceedings when it stated (R 627-8):

> "Basically, the question with which we are confronted here is the so-called 'single' versus 'duplicate' circuit question. The 'Oslo' case has been construed as enunciating a 'single circuit' policy. However, as we have pointed out above, the Commission has not followed a 'single circuit' policy subsequent to that case. Nor has it taken effective steps through its licensing procedures to effectuate a 'single circuit' policy, assuming it had such a policy."

The failure of Congress to pass legislation, introduced at the instance of Mackay after the decision in the *Oslo* case, which would have amended Section 313 so as to require that the Commission "consider competition . . . to be in the public interest", of which the Court below made quite a point (R 700), can hardly be considered as showing a Congressional intent that the advantages of competition should henceforth be completely ignored. In this connection we refer to the statement made by the Chairman of the Commission at the hearings on the bills referred to, which shows that although the Commission was not of the belief that the present law required a finding by the Commission that competition would always be in the public interest, the Commission was of the opinion that

> ". . . the practical effect of the legislation would appear to be to virtually remove the quasi-judicial powers of the Commission in this regard and require

the granting of such licenses or modifications of licenses in any case of the class to which the bill refers.

Under the existing law where the facts would support a finding of public interest in a particular case, the Commission has the power and duty upon making the statutory finding of public interest, convenience and necessity to encourage or authorize competition in direct foreign radiotelegraph communication; and it has the corresponding power and duty to deny applications which would have the result of creating competition upon a finding on the basis of the facts in a particular case that the public interest would not be served thereby."[7]

The hearings on these bills were held during the closing days of the session. Senator Wallace H. White, a member of the Senate subcommittee considering the bill, stated (R. 618):

> "I would not want the fact that there is a possibility that nothing shall be done about it in this remaining short time to be accepted by anyone as an indication of indifference to the problem before Congress or as approval of what had taken place."

Interpretation of the statutory standard in one factual situation does not constitute an unalterable measuring rod which must be applied by a regulatory body in all of its future determinations. Congress in phrasing its standard in general terms obviously contemplated a flexible rule which could be adjusted to fit different facts and changed circumstances. This Court has frequently held that administrative construction of such a standard does not call for the application of the rules of "stare decisis", "res judicata" or "estop-

[7]Hearings before Subcommittee of the House Committee on Interstate Commerce on H.R. 10348, 75th Cong., 3rd Sess. (1938), p. 3.

pel". *FTC* v. *Raladam Company*, 316 US 149, 153 (1942); *FCC* v. *WOKO, Inc.*, 329 US 223, 228 (1946); *Mester et al.* v. *United States et al.*, 70 F Supp 118, 122, affd 332 US 749 (1947).

POINT II

THE COURT BELOW ERRED IN SUPPLANTING THE DISCRETION OF THE FEDERAL COMMUNICATIONS COMMISSION UPON FINDINGS NOT ARBITRARILY OR CAPRICIOUSLY MADE AND BASED ON SUBSTANTIAL EVIDENCE.

Section 402 of the Communications Act provides the appellate procedure for decisions and orders of the Federal Communications Commission (47 USC § 402, 48 Stat. 926). Subsections (b) through (f) make provision for appeals to the Court of Appeals for the District of Columbia Circuit in cases such as the one involved here. Subsection (e) states

> ". . . that the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious."[8]

The scope of review of the Commission's decisions by the Court of Appeals has not been changed by the Administrative Procedure Act (5 USC § 1001, *et seq.*, 60 Stat. 237), concerning which this Court said in *Universal Camera Corp.* v. *NLRB*, 340 US 474, 488, 489 (1951):

> "Congress has merely made it clear that a reviewing court is not barred from setting aside a Board deci-

[8]The amendment to Section 402 of July 16, 1952 (66 Stat. 718) is not applicable to this case since it was pending prior to the effective date of the amendment.

> sion when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

and further that:

> "Retention of the familiar 'substantial evidence' terminology indicates that no drastic reversal of attitude was intended."

The findings of the Commission as set forth in its decision were not disturbed by the majority of the Court of Appeals below. They set aside no finding as arbitrary or capricious, but held only that the Commission's determination as to the "public interest, convenience or necessity" was not supported by the findings which the Commission made. The majority clearly erred in so holding because the statutory standard in question was designed by Congress to be cut and fitted by the Commission alone according to the requirements of the particular case before it.

As provided by Section 402 of the Communications Act, 47 USC § 402, as well as by Section 10(e) of the Administrative Procedure Act, 5 USC § 1009(e), if the findings of the Commission are fairly supported by substantial evidence, as they were here, they are conclusive and may not be upset on appeal. Under the statutory provisions and the decisions interpreting them, the Court of Appeals is not permitted to substitute its own judgment for that of the Commission as to what the facts found shall indicate the "public interest, convenience or necessity" to be in any proceeding before the Commission, and the inference to be drawn is exclusively one for the administrative regulatory body, not a question of law open to appellate review.

It is clear from the statement made by the majority below, *i.e.*, ". . . . we agree with the dissenting Commissioners . . ." (R 699), that they actually assumed and took over the role and function of the Commission. The opinion of the dissenting Commissioners shows that although they adopted 12 findings of the majority (R 641-4), they drew a different conclusion therefrom as to the "public interest, convenience or necessity" principally because of a difference in attitude toward competition for radiotelegraph circuits and reliance upon the decision in the *Oslo* case (R 650-2).

The choice of policy as to the extent and area of competition entering into the statutory standard has been committed by Congress exclusively to the Commission. It was therefore manifest error for the Court of Appeals to intermingle in that controversy and throw its own weight into the balance of a purely administrative decision. As this Court said in *Radio Corporation of America v. United States*, 341 US 412, 420 (1951),

> ". . . the wisdom of the decision made can be contested as is shown in the dissenting opinions of two Commissioners. But courts should not overrule an administrative decision merely because they disagree with its wisdom."

The emphasis given by the majority of the Commission to the importance of the competitive element in applying the statutory standard was eminently appropriate under the circumstances, as we have already shown at pages 18-27 above. Even if this were not true, any contention that the Commission's decision in this regard was unreasonable or unwise or that its factual conclusions upon the evidence were not accurate, is not for a reviewing court. This Court has frequently so stated on appeals from the Federal Communications Commission and other regulatory governmental

agencies. *Federal Radio Commission* v. *Nelson Bros.*, 289 US 266 (1933); *Swayne & Hoyt* v. *United States*, 300 US 297 (1937); *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 US 105 (1942); *National Broadcasting Co.* v. *United States*, 319 US 190 (1943); *McLean Trucking Co.* v. *United States*, 321 US 67 (1944); *Federal Communications Commission* v. *WOKO, Inc.*, 329 US 223 (1946).

Although the Administrative Procedure Act, 5 USC §§1001 *et seq.*, 60 Stat. 237, permits the reviewing court to set aside a decision of an administrative agency when it cannot conscientiously find that the supporting evidence is substantial, the majority of the Court of Appeals made no such determination in the case at bar. In fact, they would not have been warranted in doing so since the findings of the Commission were amply supported by the evidence, which was carefully weighed by the Commission in the light of the conflicting contentions of the parties (R 550-632). This Court said in *Universal Camera Corp.* v. *NLRB*, 340 US 474, 488 (1951) in commenting on the Administrative Procedure Act:

> "Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*."

We submit that nothing could be clearer than that the majority of the Court below violated this cardinal principle of administrative review. They completely ignored the Commission's findings that a direct circuit with The Netherlands and Portugal will be a distinct improvement over the existing indirect service rendered by Mackay and its cable associate by means of intermediate relay at London, the Azores or Lima (R 568-9, 576, 582-3, 605-6, 626-7); that such circuits can be installed at a maximum cost of about $21,000 (R 54, 56-8, 221-2, 231, 543); and that their operation will not endanger the ability of RCAC or Western Union to continue to serve the public (R 607, 581, 594). They likewise disregarded an important interest of national security in discountenancing the introduction of competition in direct radio circuits to The Netherlands and Portugal which the Commission found were important traffic centers in the European area (R 570-1, 629-30). They overlooked the findings about the doubling in volume of telegraph traffic between the United States and foreign points since 1936, so that even if Mackay's applications were granted there would still be considerably more business available per carrier to each of the points in question than there had been in 1936 (R 619).

In summary the Court of Appeals committed error in failing to heed the admonition of this Court in *United States v. Pierce Auto Freight Lines Inc.*, 327 US 515, 533-6, that the reviewing court

> "... cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law."

POINT III

THE COMMISSION'S DECISION DID NOT CONTRAVENE SECTION 314 OF THE COMMUNICATIONS ACT OF 1934.

In so far as relevant hereto, Section 314 of the Act prohibits common ownership and operation of international cable and radiotelegraph companies if,

> "the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in . . . the United States . . . and any place in any foreign country, or unlawfully to create monopoly in any line of commerce."

As stated at page 3 above, petitioner Mackay is a wholly-owned subsidiary of American Cable & Radio Corporation, (hereinafter generally referred to as AC&R), which also owns all of the stock of Commercial Cable Company and of All America Cables and Radio, Inc. The former company operates cables across the North Atlantic, and the latter company operates cables between the United States and points in Latin America and international radio circuits in Colombia and Peru.

These circumstances have given rise to a contention made by respondent RCAC both in the Commission and in the Court of Appeals, which contention in our submission is properly no part of the present appeal. It was not passed upon by the majority below (R. 702), although the dissenting judge expressed himself thereon in favor of Mackay (R 705-7). It was not stated as a question for review by petitioner in either No. 567 or No. 568, nor was it stated for review on cross-petition for certiorari by RCAC.

Under these circumstances it is our submission that this question is not properly before the Court and that this Court will not wish to pass upon it. Since we believe, however, that

it will be urged by respondent here as it has at all times below, we have thought that for completeness of presentation it should be dealt with here in this brief without in any way waiving the point above stated.

The licensing to Mackay of the direct circuits in issue and its agreements with the administrative agencies in The Netherlands and Portugal contemplated that Mackay would gain some of the cable business formerly handled by its sister company, Commercial Cable. It is this circumstance which gave rise to RCAC's charge before the Commission of a lessening of competition and restraint of trade in violation of § 314, if Mackay's applications were granted.

The Commission after careful consideration and extensive discussion (R 607-15) dismissed respondent's contention and found that granting Mackay's applications "would not result in such substantial reduction of competition between cable and radio, or in the creation of a monopoly, so as to bring the AC&R system companies, and particularly Mackay, into violation of Section 314 of the Communications Act."

As Judge Prettyman pointed out in a penetrating analysis of the question (R 705), § 314 does not prohibit all instances of common ownership and operation of cable and radio companies. By its very terms it contemplates common ownership and operation, *except only* where the purpose or effect thereof may be substantially to lessen competition, restrain commerce, or create monopoly.

The common ownership and control of Mackay and Commercial Cable as sister companies is not outlawed by § 314. In fact Mackay was organized by cable interests "to challenge RCAC's monopoly in the world-wide radiotelegraph service" (p. 17 above; see also R 610-11). In this connection it is significant that at the time of passage

of the Act in 1934, members of the Congressional committees which held hearings on the proposed legislation were aware of the common ownership and coordinated operations of Mackay and Commercial Cable, and yet no provision prohibiting continued common ownership was inserted in § 314 (R 610-11).

The question of a possible contravention of the statute by the combination of cable and radio operations within the AC&R system was the subject of a separate investigation by the Commission (FCC Docket 9093), which concluded in its decision rendered May 11 1950 (R 608-9):

> "The ownership, control and operation of cable and radio companies and facilities within the AC&R system do not constitute or result in a violation of Section 314 of the Communications Act of 1934, as amended."

Much of the evidence upon which that decision was predicated was incorporated into that record from the instant proceeding. RCAC intervened and participated fully in that investigation, but did not request that the Commission reconsider nor did it appeal from the decision there reached (R 608). Nevertheless, RCAC proceeded to attack that decision collaterally in the Court of Appeals below.

The Commission's conclusion that granting Mackay's application in the present proceedings would not result in a substantial lessening of competition, and hence would not be violative of § 314, is clearly justified by the undisputed facts of record here. It appears that at the time of the hearings in the instant proceedings there was substantial over-all competition between radio and cable services in The Netherlands and Portugal business. With respect to the

former, there was competition between Western Union and Commercial Cable, as cable carriers, between cable carrier Western Union and radiotelegraph carrier RCAC, and between cable carrier Commercial Cable and radio telegraph carrier RCAC (R 612-3). With the granting of Mackay's applications there would be competition between Mackay and Western Union, between Mackay and RCAC, and between Western Union and RCAC (R 613). Furthermore, Commercial Cable would still remain in the cable field and provide competition to both Western Union and RCAC. The Commission also found that the same competitive situation would exist with respect to Portugal (R 613).

There is no question that some cable traffic which the AC&R system previously handled through Commercial Cable would, upon the granting of Mackay's applications, be handled by Mackay. But, since, as shown above, the present operation of Mackay and Commercial Cable as sister companies under the same ownership does not violate § 314, a flow of some business from one to the other would not lessen competition. In fact, the Commission found that there was no substantial or effective competition between Mackay and Commercial Cable at the time of the hearings in this proceeding, since Mackay, Commercial Cable and All America Cables, all wholly owned by AC&R, were operated "as an integrated cable and radio system" (R 609). With respect to competition between cable and radio within the AC&R system, it is thus not possible to lessen substantially competition which does not exist. Furthermore, as stated above, Commercial Cable will not be withdrawn from the competitive field for traffic destined to either The Netherlands or Portugal and will provide competition to both Western Union and RCAC (R 251-6, 275-8,

343-4, 613). As the dissenting judge said (R 706), "AC&R will certainly still seek cable business in the public market."

With respect to the effect of Mackay's new circuits on competition between the AC&R system and its two principal competitors, RCAC by radio and Western Union by cable, the Commission found that (R 614)

> ". . . there will still be substantial competition between cable and radiotelegraph carriers for traffic to each of the three points [referring to The Netherlands, Portugal and Surinam] and that the AC&R system would not have a monopoly of the traffic to any of these points."

It is thus apparent that not only will Mackay enter more strongly into the competitive picture by reason of the direct circuits to the points in issue, but the AC&R system will continue to compete by means of the cable facilities of Commercial Cable. With respect to radio versus cable competition, it is clear that Commercial Cable will continue to be a competitive factor as opposed to its present radio competitor RCAC, and that Mackay will become an increasingly effective competitor as against its present cable competitor Western Union. Both Mackay and Commercial Cable will provide competition against any and all cable and radio companies which are not affiliated with the AC&R system.

Although Mackay's direct operation of circuits to The Netherlands and Portugal may result in a competitive diversion of some traffic from its competitors RCAC and Western Union, there is no indication that either of these companies will lessen their competitive efforts or that their capacity to compete will be endangered (R 614-615).

In arguing that § 314 was violated by the Commission, respondent in its brief opposing certiorari cited *Standard Oil Co. of California* v. *United States*, 337 US 293 (1949)

and *International Salt Co. Inc.* v. *United States,* 332 US 392 (1947). These cases have nothing to do with § 314 or with the situation at hand. The former case involved an infringement of Section 3 of the Clayton Act, where a large oil company entered into contracts with independent dealers in petroleum products and automobile accessories, under which they agreed to purchase exclusively from the company all of their requirements. In the latter case, the International Salt Company, the country's largest producer of salt for commercial purposes, was held to have violated the Sherman Act § 1 and the Clayton Act § 3 by reason of provisions in its leases of patented machines to third parties which required the lessees to use only the company's salt products.

Respondent also argued that the diversion of traffic from Commercial Cable to Mackay would constitute an allocation of trade territories and a pooling arrangement, and hence be illegal under the holding of this Court in *Timken Roller Bearing Co.* v. *United States,* 341 US 593 (1951). In the first place the arrangement between Commercial Cable and Mackay does not contemplate any allocation of territory or any pooling. Moreover, in the *Timken* case it was found (341 US at 597-8) that the dominant purpose of the restrictive agreements in which the American, British and French Timken companies entered "was to avoid *all* competition either among themselves *or with others.*" This is not true here.

Respondent has also complained that under the agreements between Mackay and the foreign administrations in The Netherlands and Portugal, AC&R would have an advantage over RCAC in obtaining allocation of return traffic since RCAC has no cable affiliation. Respondent labeled these agreements "tying" agreements and charged

they were in violation of the antitrust laws, citing *United States* v. *Griffith*, 334 US 100 (1948) and other cases. None of these are at all in point.

Respondent's charge of a violation of Section 314 does not ring true when we consider that respondent has always had a monopoly on the direct radiotelegraph circuits to the points in issue, and now opposes the granting of Mackay's applications for permission to compete, so that respondent's monopoly may continue to flourish. Judge Prettyman aptly commented in concluding his discussion of the Section 314 question (R 707):

> "Section 314 embodies a portion of antitrust policy, specifically provided by the immediately preceding Section 313. The Commission was entitled to look at the whole picture in formulating its judgment as to the public interest. Thus viewed this grant of a radio circuit to Mackay certainly tends to serve the purposes of the statute: RCAC now enjoys a monopoly in radio between the places here involved. Mackay, by this grant, would introduce competition, would reduce restraint on commerce, and would destroy instead of create monopoly. The Commission thought these broader considerations pertinent and important. I think so too."

CONCLUSION

For the foregoing reasons

(1) the Court of Appeals has erred on vital points affecting the maintenance of the national policy respecting competition and the future administration by the Federal Communications Commission of the development of international communications;

(2) its decision should be reversed by this Court; and

(3) the order of the Federal Communications Commission granting petitioner's applications for direct circuits to The Netherlands and Portugal should be reinstated.

Respectfully submitted,

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New York, April 6 1953.

APPENDIX OF STATUTES

Administrative Procedure Act of 1946, 5 USC §§ 1001 et seq.

"§ 1009(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

Communications Act of 1934, as amended, 47 USC §§ 151, et seq.

"§ 151. Purposes of Act; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facili-

ties at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."

"Sec. 309.(a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."

"Sec. 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any

licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however*, That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court."

"§ 314. Competition in commerce; preservation

After the effective date of this chapter no person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire energy, communications, or signals by radio in accordance with the terms of the license issued under this chapter, shall by purchase, lease, construction, or otherwise, directly or indirectly, acquire, own, control, or operate any cable or wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such cable, wire, telegraph, or telephone line or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; nor shall any person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or

receiving for hire messages by any cable, wire, telegraph, or telephone line or system (a) between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any other State, Territory, or possession of the United States; or (b) between any place in any State, Territory, or possession of the United States, or the District of Columbia, and any place in any foreign country, by purchase, lease, construction, or otherwise, directly or indirectly acquire, own, control, or operate any station or the apparatus therein, or any system for transmitting and/or receiving radio communications or signals between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such radio station, apparatus, or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce."

"§ 602 (d) [15 USC § 21]. Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; . . ."

Radio Act of 1927

"§ 9 The licensing authority, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act . . ."